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THE EXTENT TO WHICH THE NATIONAL HISTORIC PRESERVATION ACT REQUIRES CULTURAL RESOURCES TO BE IDENTIFIED AND CONSIDERED IN THE GRANT OF A FEDERAL RIGHT-OF-WAY*

M-36917

December 6, 1979

1. National Historic Preservation Act: Generally—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to (1) identify potentially affected cultural resources; (2) consult regarding such effect with the Advisory Council on Historic Preservation; and (3) to consider these cultural resources in making or denying the grant. A rule of reason applies as to the scope of the lands to be inventoried, and the degree of effort required.

2. National Historic Preservation Act: Applicability—Rights-of-Way: Generally—Rights-of-Way: Conditions and Limitations.

The grant of a right-of-way over Federal land for a pipeline or other linear project is a Federal undertaking which requires the authorizing agency to comply with sec. 106 of the National Historic Preservation Act, as implemented by 36 CFR Part 800.

3. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands affected by construction activities on Federal lands. 36 CFR 800.4(a).

4. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands which may foreseeably be affected by the grant of the right-of-way. A rule of reason applies in determining the extent of non-Federal lands on which cultural resources are to be identified, and the degree of effort required. 36 CFR 800.4(a)

5. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

In the grant of a right-of-way over Federal lands for a pipeline or other linear project, the scope of lands to which the requirements of sec. 106 of the National Historic Preservation Act apply may be analogous to the scope of lands to be considered pursuant to sec. 102 of the National Environmental Policy Act.

Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 43 IBLA 259 (1979), overruled in pertinent part.

TO: SECRETARY
FROM: DEPUTY SOLICITOR
SUBJECT: THE EXTENT TO WHICH THE NATIONAL HISTORIC PRESERVATION ACT REQUIRES CULTURAL RESOURCES TO BE IDENTIFIED AND

*Not in chronological order.

CONSIDERED IN THE GRANT OF A FEDERAL RIGHT-OF-WAY

I. Introduction and Summary

A recurring issue involved in the grant of a pipeline or other linear right-of-way over federal lands is whether or not the procedures to protect cultural resources in sec. 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (1976), apply to non-federal as well as federal lands involved in the project. We have been requested to provide guidance on this question in light of the Interior Board of Land Appeals' recent decision on this subject, *Western Slope Gas Co.*, 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979).

Sec. 106 demands essentially three things of a federal agency considering the grant of a right-of-way: (1) to *identify* properties listed on the National Register or eligible for listing, and which are potentially affected by the undertaking; (2) to *consult* with the Advisory Council on Historic Preservation on the undertaking's potential effects on the identified properties; and (3) to *consider* these cultural resources in planning and implementing the undertaking.

Analysis of this question requires the interpretation of the Advisory Council on Historic Preservation's regulations implementing sec. 106, 36 CFR 800 (published at 44 FR 6068 (Jan. 30, 1979)), which are binding on all federal departments. 16 U.S.C. § 470s (1976). *See also* President's Memorandum on Environmental Quality and Water Resources Management (July 12, 1978). The broad definition these regulations give to the federal "undertaking" and the "area of the undertaking's potential environmental impact" indicates that lands are subject to sec. 106 procedures if they either fall within the area of the undertaking or may be directly or indirectly affected by the undertaking. Such areas include non-federal lands which it is reasonably foreseeable will be affected by the federal undertaking. Decisions of United States courts of appeal which have considered sec. 106 and the similar National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1976), are consistent with the regulations' broad definitions of "undertaking" and "area of the undertaking's potential environmental impact."

As explained more fully below, it is therefore my opinion that the agency granting a right-of-way across federal lands must also follow these procedures for non-federal lands involved. This conclusion, which I am asking you to approve as a matter of Departmental policy, means that the decision in *Western Slope* incorrectly limited the scope of sec. 106 to federal lands. Henceforth, upon your approval, the rule to be applied in this Department should be that the federal grant for a pipeline or other linear right-of-way requires the Department to comply with sec. 106 on both the federal and non-federal lands involved in the project, as set forth in this opinion.

Two things should be noted immediately about this conclusion. *First*, these requirements are subject to a rule of reason as to the scope of the lands to be inventoried, and the degree of effort required. These judgments are made by the project manager in consultation with the State Historic Preservation Officer. *Second*, the NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources.

Parts II and III of the opinion set forth my analysis in reaching the above conclusions. Part IV outlines the criteria which determine the extent of the area to be studied, and the various methods for identifying cultural resources, ranging from literature and records searches to field surveys.

II. Scope of Cultural Resources Obligations Pursuant to Sec. 106 of the NHPA

The regulations of the Advisory Council on Historic Preservation, which 16 U.S.C. § 470s (1976) makes binding on all federal agencies, require:

> [E]ach Federal agency to identify or cause to be identified any National Register or eligible property that is located *within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.*

36 CFR 800.4(a)(italics added). This statement defines the area within which the identification and other requirements of sec. 106 must be met. *See id.* 800.4(a),(b).

It is clear that the federal grant of a right-of-way permit for a pipeline or other linear project crossing federal lands fits the definition of an "undertaking":

> "Undertaking" means any Federal, federally assisted or federally licensed action, activity or program or the approval, sanction, assistance or support of any non-federal action, activity, or program.

36 CFR 800.2(c). *Accord*, *Western Slope Gas Co.*, 40 IBLA 280, 287 (1979).

The question then becomes the extent of the area subject to sec. 106 procedures for the undertaking. This area is "the area of the undertaking's potential environmental impact," defined as follows:

> "Area of the undertaking's potential environmental impact" means that geographic area within which *direct and indirect effects generated by the undertaking* could reasonably be expected to occur.

36 CFR 800.2(o) (italics added). Therefore, the "area of the undertaking's potential environmental impact," as defined, determines the extent of lands which must be studied pursuant to sec. 106 for a proposed federal action. *See* BLM Manual 8100.07.

The concept of "direct and indirect effects" is also defined in the Advisory Council regulations, as follows:

> An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or further removed in distance, but are still reasonably foreseeable.

36 CFR 800.3(a). These effects therefore include all reasonably foreseeable effects caused by the federal undertaking. Non-federal lands are therefore included under this regulation in two circumstances. First, non-federal lands are to be inventoried when construction activities on federal land affect surrounding non-federal land. *Accord*, *Western Slope*, *supra*, 40 IBLA at 287 & n. 2. Second, both kinds of effects logically also include actions which are the reasonably foreseeable consequence of a federal action, such as the construction of non-federal portions of a pipeline or other linear right-of-way. *Accord*, BLM Manual 8100.07(A) ("The Bureau assures that its actions or authorizations take into consideration their effect on cultural resources located on non-federal land").

The regulations thus limit the effects to be studied to those which "could reasonably be expected to occur" as a result of the federal action, *id.* 800.2(o), and thus explicitly adopt a rule of reasonableness, which requires that all reasonably foreseeable effects be studied for potential impact on cultural resources.

The courts have uniformly adopted this interpretation of sec. 106. In cases involving the construction of highways, courts have required agencies to consider the project as a whole, even when certain portions were non-federal. In *Hall County Historical Soc.* v. *Georgia Dept. of Transportation*, 447 F. Supp. 741 (N. D. Ga. 1978), the court held that a state could not avoid compliance with the NHPA by itself funding a portion of a federal-aid highway unless the state turned the whole highway into a purely non-federal project:

> Because to allow defendant [Georgia Dept. of Transportation] to complete construction of that portion of the project known as "the Green Street extension" without the use of federal funds would, in effect, result in a defeat of Congressional intent and of the policies behind the National Historic Preservation Act, the court concludes that unless and until defendant GDOT withdraws all requests for disbursement of further federal funds for the project construction and immediately and forthwith reimburses the federal government for all funds previously disbursed for the project construction, defendant GDOT, its employees, agents, and all others acting in concert with it, are hereby enjoined from construction of that portion of the project known as "the Green Street extension," pending the Federal Highway Administration's compliance with the National Historic Preservation Act.

Id. at 752. Similarly, the court in *Thompson* v. *Fugate*, 347 F. Supp. 120 (E.D. Va. 1972) held that the NHPA applied to an 8.3 mile segment of a 75 mile highway project

when the remainder of the project was federally subsidized, even though no federal action had yet been taken on the smaller segment. *But see Western Slope*, *supra*, 43 IBLA at 262.

The highway cases conceivably might be distinguished on the ground that there is slightly more federal involvement in the non-federal portions of major highways than exists with pipeline rights-of-ways. For example, informal federal participation in highway planning sometime occurs prior to a state's decision to reject federal funds due to a planning controversy. *See*, *e.g.*, *Thompson*, *supra*. The reasoning of the cases is not so limited, however, and instead stands for the broader proposition that all parts of an interconnected project must be considered together. Therefore, they provide a persuasive analogy to the linear right-of-way situation. *See* p. 33, *infra*.

In a non-highway situation, the Fourth Circuit in *Ely* v. *Velde*, 497 F. 2d 252 (4th Cir. 1974) held that a state could not avoid NHPA requirements by the expedient of requesting diversion of Federal funds previously allocated for a prison center to other federal-aid projects. The court reached this result even though the center was independent of the other projects. This is an even stronger case than the cases concerning connected highways, because it shows what kind of indirect federal involvement is sufficient to trigger sec. 106 compliance.

There are, nevertheless, some reasonable limits to the group of activities which can be considered to be direct or indirect effects of a federal undertaking, and so subject to cultural resource identification. For example, in *Weintraub* v. *Rural Electrification Admin.*, 457 F. Supp. 78 (M.D. Pa. 1978), plaintiffs argued the following chain of causality required a federal agency to comply with sec. 106: a private utility had previously received federal low-interest rate loans for general power purposes, which were so profitable to the utility that it had surplus earnings, which it chose to spend in independently constructing a new headquarters building, which needed parking, and which required demolition of an historic building for a parking lot. *Id.* 90–91. The court rejected plaintiffs' contention that the latter demolition was therefore a federal undertaking, noting the causal connection between the federal action and the non-federal action was more attenuated than it was in *Ely* v. *Velde*, *supra*. The *Weintraub* facts are very different from that of a pipeline or other linear right-of-way which must foreseeably

stretch across both federal and non-federal land, and the decision is a good example of when effects are so unforeseeable and remotely connected with an agency's action that they need not be included in a cultural resources survey.

The Board's decision in *Western Slope* determined that the federal grant of a pipeline right-of-way required sec. 106 compliance only on federal lands. Thus, non-federal lands over which connected portions of the pipeline stretched would not require an inventory, though the Board noted the Bureau of Land Management could order such an inventory in its discretion. 40 IBLA at 290. The Board's holding that cultural resource identification is not required plainly conflicts with the broad definition of the "area of the undertaking's potential environmental impact" in the Advisory Council regulations, 36 CFR 800.2(o), as well as the decisions in *Hall County Historical Society*, *supra*, and *Thompson*, *supra*. The federal grant of the right-of-way and the foreseeable construction of other parts of the pipeline on non-federal lands have a close cause and effect relationship in the *Western Slope* type of situation. Construction on non-federal lands would not proceed without the federal grant, and the casual connection between the two can hardly be termed remote and speculative, as it was in *Weintraub*. Therefore, the construction on non-federal lands of a linear right-of-way project is within the area of the federal undertaking's potential environmental impact, and subject to sec. 106.

III. The NEPA Analogy

The preamble to the Advisory Council's regulations implementing sec. 106 states that the Council intended to adopt in 36 CFR 800.2(o) and 800.3 a definition of direct and indirect effect which "is consistent with the definition adopted by the Council on Environmental Quality." 44 FR 6069 (1979). CEQ's definition is found in its NEPA regulations at 40 CFR 1508.8 (published at 43 FR 55978 (1978)), and is identical to the quotation on page 30 *supra*.

NEPA itself provides evidence of Congress' intent in passing sec. 106, and the correct interpretation of the Advisory Council's implementing regulations. For example, Environmental Impact Statements (EIS's) under NEPA are to consider the "environmental impact of the proposed action," 42 U.S.C. 4332(2)(C)(i) (1976), a standard which is closely similar to that in sec. 106 that agencies "take into account the effect of the undertaking on [National Register properties or eligible properties]." Furthermore, NHPA studies are by regulation designed to be integrated as part of the NEPA process, 36 CFR 800.9, further demonstrating the relationship between the two programs.

CEQ's NEPA regulations are even more detailed than the NHPA regulations in describing how non-federal actions are related to federal actions. The section on "effects" requires consideration of all effects

in any way "caused" by a federal action, whether directly or indirectly. 40 CFR 1508.8. The section on the scope of an EIS requires agencies to consider the following actions:

> (a) Actions (other than unconnected single actions) which may be:
>
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) *Cannot or will not proceed unless other actions are taken previously or simultaneously.*
>
> (iii) *Are interdependent parts of a larger action* and depend on the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

40 CFR 1508.25(a) (italics added). *Accord*, *Sierra Club* v. *Hodel*, 544 F.2d 1036 (9th Cir. 1976) (EIS had to include effect of a wholly non-federal aluminum reduction plant when construction of the plant depended on federal construction of a pipeline to serve it and a federal contract to provide power); *National Forest Preservation Group* v. *Butz*, 485 F.2d 408 (9th Cir. 1973); *Sierra Club* v. *Morton*, 400 F. Supp. 610, 644–45 (N.D. Cal. 1975).

The similarity between the provisions of NEPA and sec. 106 make the above quoted provisions of the CEQ regulations an accurate summary of what federal agencies must consider pursuant to sec. 106. In this connection, the Second Circuit in *Watch* v. *Harris*, 603 F.2d 310 (2d Cir. 1979), held that "the mandate of NHPA * * * is quite broad" and that the courts "are no more willing to give a 'crabbed interpretation' to sec. 106 of the Act than the courts have been in respect to NEPA." *Id.* at 326.

IV. Scope of Section 106 Procedures for Rights-of-Ways

A. Extent of Area Studied

Useful guides for determining the geographical scope of the necessary study of rights-of-way impacts are found in cases dealing with the scope of EIS's for federal highways. The three principal criteria are:

(a) the logical termini of the project;

(b) the independent utility of a portion or segment; and

(c) whether the length selected assures adequate consideration of alternatives.

Daly v. *Volpe*, 514 F.2d. 1106, 1109–10 (9th Cir. 1975). These criteria implement a rule of reasonableness, which may allow that less than the whole length be studied in certain circumstances. Such circumstances may be spelled out in counterpart regulations the Bureaus may develop pursuant to 36 CFR 800.11.

The project manager is to implement the rule of reason in

choosing the area to be studied, under the criteria of 36 CFR 800, and in consultation with the State Historic Preservation Officer. *See* 36 CFR 800.4(b). The Advisory Council's advice may also be sought in determining the area subject to sec. 106 compliance.

B. Type of Identification Study

Sec. 106 and the Advisory Council's regulation do not require an on-site inspection for cultural resources for every portion of the area affected by the federal undertaking. The identification requirement first calls for a record or literature search to determine if known resources are located within the project's area of environmental impact. 36 CFR 800.4(a)(1). Based on the outcome of this search and the recommendations of the State Historic Preservation Officer, it is up to the agency to determine to what extent, if any, an on-site survey is required. *Id.* (a)(2). In effect, a rule of reason applies.

V. Conclusion

For the reasons explained above, I have concluded that the Board's decision in *Western Slope Gas Co.*, 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979) is inconsistent with the law, and should not govern this Department's actions in the future. Upon your approval, this opinion will have prospective effect only, and will not affect the permit issued to the Western Slope Gas Co., at issue in the *Western Slope* case.

FREDERICK N. FERGUSON
DEPUTY SOLICITOR

APPROVED:

LEO M. KRULITZ
ACTING SECRETARY

UNITED STATES
v.
CLARE WILLIAMSON & LAPINE PUMICE CO.

45 IBLA 264

Decided *February 4, 1980*

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring four placer mining claims invalid for lack of discovery (Contest Nos. Oregon 011735 and Oregon 6115).

Affirmed in part; reversed in part.

1. Mining Claims: Contests—Mining Claims: Lands Subject to—Mining Claims: Location—Mining Claims: Withdrawn Land

A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit.

2. Mining Claims: Discovery: Generally—Mining Claims: Discovery: Marketability

A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a char-

acter that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

3. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining laws subsequent to the to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid.

4. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

If a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate.

5. Administrative Procedure: Burden of Proof—Evidence: Preponderance—Evidence: Prima Facie Case—Mining Claims: Contests—Mining Claims: Determination of Validity

Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim.

6. Evidence: Generally—Evidence: Burden of Proof—Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails.

7. Mining Claims: Discovery: Marketability

Although a favorable showing of actual sales may demonstrate marketability, lack of sales is not necessarily conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is heard, by a preponderance of the evidence showing that a prudent person could have extracted and marketed the mineral profitably.

8. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Mineral Lands

Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with

the effect that the claimant must show that each 10 acres of the claim are mineral in character.

9. Mining Claims: Determination of Validity—Mining Claims: Excess Reserves

The charge of invalidity due to the presence of excess reserves admits that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral present in unchallenged claims owned by the mineral claimant, the mineral in the challenged claims would have no market and thus is essentially valueless.

10. Mining Claims: Contests—Rules of Practice: Government Contests—Rules of Practice: Hearings

In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected.

11. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Mining Claims: Withdrawn Land

A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted.

APPEARANCES: Edward L. Fitzgibbon, Esq., and James W. Morrell, Esq., Fitzgibbon and Morrell, Portland, Oregon, for appellants; Arno Reifenberg, Esq., Regional Attorney, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Clare Williamson and the LaPine Pumice Co. appeal from the Mar. 30, 1977, decision of Administrative Law Judge Robert W. Mesch which declared four placer mining claims in Deschutes County, Oregon, invalid for failure to establish timely discovery. The decision followed a hearing in 1976 on two cases, Oregon 011735 and Oregon 6115, which had been consolidated for review.[1]

The four mining claims were originally located for lump pumice by Lloyd Williamson in association with several other persons. The co-locators subsequently conveyed their respective interests in the claims to Williamson, and Clare Williamson inherited her husband's interest upon his death in 1958. She is presently the sole owner of the four claims. LaPine Pumice Co. has a leasehold interest in the claims.

Judge Mesch described the history of these claims at length in his opinion and we include portions of

[1] The mining claims are identified in the record and this opinion as Claim Nos. 1–4. Claim No. 2 is at issue in Oregon 011735 and Claim Nos. 1, 3, and 4 are at issue in Oregon 6115. The claims are located within the Deschutes National Forest about 40 miles south of Bend, Oregon, on lands withdrawn from mining location by the Act of Dec. 21, 1945, 59 Stat. 622. Claim Nos. 1, 2, and 3 are contiguous and Claim No. 4 is a short distance to the south. Each claim covers approximately 160 acres.

that description here as background for the case.

Oregon 011735 has been pending before the Department since at least June 26, 1963, when a complaint was filed at the request of the Forest Service, challenging the validity of the major portion of Claim No. 2. The Forest Service did not question the validity of the claim as to approximately 17 acres in what has been designated as the east half of Lot 6. The Government's evidence at the 1964 hearing was directed toward showing that the uncontested portion of the claim contains lump pumice in sufficient quantity to satisfy the demand for the mineral from the claim for a reasonable period in the future and the remaining portions of the claim are not valuable for the pumice which they contain because there is no market for it. The mining claimant's evidence was directed toward demonstrating the marketability of the pumice found on the claim and toward refuting the Government's showing of abundant reserves on the uncontested portion of Lot 6. The only issue for determination was whether the contested portions of the claim were invalid under a theory of excess reserves which made the land nonmineral in character.

By a decision dated January 6, 1965, the Hearing Examiner dismissed the complaint upon finding that: (1) the evidence, as well as admissions of the Forest Service, established a discovery of a valuable mineral deposit within the uncontested portion of the claim; (2) lump pumice was found on each subdivision of the claim sufficient to qualify the land as mineral in character; and (3) the Government's argument was not convincing that there is no present or prospective market for the pumice within the contested portions of the claim because of the quantity of pumice within the uncontested portion of the claim.

The Forest Service appealed to the Director, Bureau of Land Management. Among other things, the Forest Service suggested that its original determination that the east half of Lot 6 met the requirements of the mining laws may have been questionable. In a decision of March 31, 1966, the Office of Appeals and Hearings found the evidence unconvincing that there was a discovery of valuable minerals on the claim prior to the time the land was withdrawn from mining location by the Act of December 21, 1945. The lack of evidence on the issue of discovery, it surmised, was possibly due to the failure of the Forest Service to charge lack of discovery on the east half of Lot 6. The Office of Appeals and Hearings concluded that the complaint was erroneously drawn, inasmuch as a correct finding with respect to discovery was indispensable to a proper determination of the validity of the claim. It remanded the case for a hearing on the issue of whether a discovery of valuable minerals was made on the claim prior to the 1945 withdrawal.

The mining claimant appealed to the Secretary of the Interior. She complained, among other things, that the Forest Service had recognized there was a valid discovery on the east half of Lot 6 and the only issue before the Director was whether the Hearing Examiner's decision concerning the mineral character of (or excess reserves in) the contested portions of the claim was supported by substantial evidence. In a decision dated October 23, 1968 (75 I.D. 338), the Assistant Solicitor ruled that the Department was not precluded from inquiring into any question vital to the determination of the validity of a mining claim and the case presented the occasion for the exercise of the Department's plenary authority.

This decision raised a new issue. The Assistant Solicitor commented:

"Contestant's efforts at the hearing were directed to showing that *at that time* the uncontested portion of lot 6 contained such a large tonnage of marketable lump pumice as to make the lump pumice on the contested portions of the claim valueless. Appellant, on the other hand, attempted to deprecate the amount of pumice on the uncontested portion of lot 6 so as to establish the marketability of the pumice on the contested portions of the claim. Neither party attempted to establish the existence or nonexistence of lump pumice in each 10-acre subdivision of the claim *as of December 21, 1945*, in such quantity as would render its extraction profitable and justify expenditures to that end." (p. 345)

The Assistant Solicitor summarized the testimony of a Forest Service mining engineer relating to the excess reserve contention. He noted that the mining engineer's estimates of tonnage were based upon conditions observed at the time of his examinations of the claim between 1961 and 1964 and that practically all of the conditions relied upon were nonexistent in 1945. He concluded that the evidence left wholly unanswered the question as to whether an estimate of the quantity of useable pumice on the claim could have been made upon the basis of evidence discernible in 1945. He noted that the testimony of the Forest Service mining engineer suggested such an estimate could not have been made.

The Assistant Solicitor found that the mining claimant did nothing to supply the want of evidence of a basis for any inference in 1945 of the quantity of useable pumice on the claim. He stated that the testimony of expert witnesses for the mining claimant on the question of the quantity of pumice present on the claim was to the effect that an estimate of the tonnage of commercial lump pumice could not be made even upon the basis of data available [*sic*] at the time of the hearing.

* * * * *

The Assistant Solicitor went on and stated that if the case was decided upon the basis of the claimant's evidence, it would have to be concluded that she failed to demonstrate that the contested land was known to be mineral in character on December 21, 1945, and that there is no validity to her claim to the land. He concluded, however, that while the claimant introduced no evidence bearing upon what he deemed to be the critical issue of the case, neither the case presented by the Forest Service nor the charges of the complaint were calculated to elicit such evidence. He noted that the complaint charged simply that the contested land "is nonmineral in character" without any reference to a point in time as of which the mineral or nonmineral character of the land was to be determined.

The Assistant Solicitor recognized that the Forest Service could properly elect to challenge the validity of the claim as of the time of the hearing rather than the time of the withdrawal. He was unwilling to assume, however, that the Forest Service had made such an election. He stated that there was reason to doubt whether the actions of the Forest Service reflected accurately the facts which the Forest Service proposed to establish and concluded that the record was not a satisfactory basis for determining the validity of the claim. He returned the case to the Bureau of Land Management to notify the Forest Service that it had 60 days to recommend the amendment of the complaint or the filing of a new complaint.

On July 23, 1969, an amended complaint was issued charging that a discovery of a valuable mineral deposit had not been made within the claim by December 21, 1945, and the land within the claim (with the exception of the east half of Lot 6) "is nonmineral in character."

The mining claimant sought a dismissal of the complaint contending that it was not filed within the required 60-day period. By a decision dated May 25, 1970,

the Bureau's Office of Appeals and Hearings rejected the claimant's contentions and remanded the case for hearing on the amended complaint. This decision was appealed to the Board of Land Appeals. On May 27, 1975, the parties filed a stipulation with the Board requesting an order (1) permitting Clare Williamson to withdraw her appeal from the Bureau's decision issued five years previously, (2) reinstating the order of the May 25, 1970 decision remanding the case for further hearing, and (3) consolidating the case with Oregon 6115. By an order of January 22, 1976, the Board granted the requests in the stipulation.

Oregon 6115 was initiated on April 13, 1970, with the filing of a complaint charging that Claims 1, 3 and 4 were invalid because they had not been perfected by a discovery of a valuable mineral deposit prior to December 21, 1945, and the land within the claims "is nonmineral in character." This case was held in abeyance pending the outcome of the appeal from the May 25, 1970 decision of the Bureau.

(Dec. 2–6).

At the 1976 hearing, the Forest Service presented one witness, Milvoy Suchy, a Forest Service mining engineer, who had also testified at the 1964 hearing. He repeated some of his earlier testimony in condensed form as to Claim No. 2,[2] and extended his estimates and conclusions concerning the overabundant amount of lump pumice to include Claim No. 1 and the north half of Claim No. 3. He further testified that he had not been able to find sufficient exposures of lump pumice to make any estimate or reach any conclusion concerning the existence of lump pumice on the south half of Claim No. 3 and all of Claim No. 4. As at the 1964 hearing, Suchy's testimony was based upon his experience as a mining engineer, his personal observation of the conditions on the four claims, and information obtained at the time of his examination of the claims on nine or ten occasions from 1961 to 1973.

The appellants presented three witnesses who also had testified in 1964: Clare Williamson, the mining claimant; Donald T. Fahey, a general building contractor who had worked for the Williamsons; and James Miller, a market analyst and, by 1976, one of the owners of La-Pine Pumice Co. Through these three witnesses, appellants reconstructed the history of activities on the four claims and presented the findings and plans of Lloyd Williamson with respect to the claims. In addition, appellants elicited discussion of the nature and quality of the pumice on the Williamson claims and the use and general marketability of that pumice.

For the purpose of this appeal, it is necessary to examine the specific charges made by the Forest Service. In the amended complaint for Oregon 011735, the Forest Service charged that:

[2] The parties agreed that relevant portions of the 1964 hearing transcript would be incorporated into the record of the case. They also agreed that material presented with respect to Claim No. 2 at the earlier hearing which was pertinent to the other claims could be considered in connection with all four claims. Citations to the 1964 transcript in this opinion will read 1 Tr. —, and to the 1976 transcript, 2 Tr. —.

A. A discovery of a valuable mineral deposit had not been made within the unnamed placer claim by December 21, 1945.

B. The portion of the claim made up of lots 3, 4, 5, 7, and the west half of lot 6 is nonmineral in character.

C. As to the following portion of the east half of lot 6:

"Commencing at the quarter corner between Section 36, Township 21 South, Range 12 East, and Section 31, township 21 South, Range 13 East, W.M., thence North 34°15' East a distance of 3744 feet to stake No. 1, the point of beginning; thence South 64° East a distance of 125 feet to Stake No. 2; thence North 26° East a distance of 125 feet to stake No. 3; thence North 64° West a distance of 125 feet to stake No. 4; thence South 26° West a distance of 125 feet to stake No. 1, the point of beginning." At the time the mining claim was located, the above-described portion of the east half of Lot 6 was not open for the location of a mining claim since it had been appropriated to another use by the issuance of a special-used permit to the Oregon State Game Commission dated December 6, 1932, which permit is still in effect.

In Oregon 6115, the complaint charged that:

A. Minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery prior to December 21, 1945.

B. No discovery of a valuable mineral had been made within the limits of the claims by December 21, 1945, because it had not been shown by that time that the materials could be marketed at a profit or that there existed a market for these materials.

C. The land within the claims is nonmineral in character.

The complaints raise two principal issues: whether there was a discovery on each claim by Dec. 21, 1945, and whether certain portions of Claim No. 2 and Claim Nos. 1, 3, and 4 are nonmineral in character. We shall address these issues in the order suggested by the complaints since a claim of mineral character may be supported by geological inferences arising out of discovery. *United States* v. *Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972) *appeal pending Bunkowski* v. *Applegate*, Civ. No. R-76-182-BRT, (D. Nev. filed Sept. 22, 1976).

[1] Before examining these issues, however, we wish to address a question which neither side has pursued in this appeal. Charge C of the complaint filed in Oregon 011735 alleged that a portion of the east half of Lot 6 was not open to location at the time Claim No. 2 was initiated, because of a prior grant of a special use permit by the Forest Service to the Oregon State Game Commission. This charge is invalid, and should have been dismissed.

Effectively, this charge is premised upon a belief that the Forest Service could, through issuance of a special use permit, withdraw the land. There is no support for such a proposition.

The Secretary of Agriculture, as a general matter, is neither expressly nor impliedly authorized to withdraw unimproved national forest lands from mineral location. *See generally United States* v. *Foresyth*, 15 IBLA 43, 49-54 (1974); *United States* v. *Bergdal*, 74 I.D. 245, 249-52 (1967); *United States* v. *Crocker*, 60 I.D. 285 (1949). Indeed, Exec. Order No.

10355 expressly delegated both the inherent authority of the President to withdraw land, and the authority conferred upon him by the Pickett Act, 36 Stat. 847, 43 U.S.C. § 141 (1970), to the Secretary of the Interior. Included with this was the authority to withdraw land under the administrative jurisdiction of any executive department, with the concurrence of the head of that agency. *See* Sec. 1(c), Exec. Order No. 10355, 17 FR 4831 (May 26, 1952). Without the formal action of the Secretary of the Interior, however, no agency could withdraw the land which it administered. Thus, mere issuance of a special use permit could not operate to withdraw the land from mining or mineral location. *A. W. Schunk*, 16 IBLA 191, 81 I.D. 401 (1974). *See also United States* v. *McClarty*, 17 IBLA 20, 81 I.D. 472 (1974).[3]

At the hearing the parties stipulated to the correctness of this charge (2 Tr. 4). But on review of an appeal this Board has full powers of de novo review. *Exxon Co., U.S.A.*, 15 IBLA 345 (1974). Moreover, as this Board has recognized, parties may not stipulate to an erroneous theory of law. *United States* v. *Ideal Cement Co.*, 5 IBLA 235, 79 I.D. 117 (1972), *aff'd sub nom. Ideal Basic Industries* v. *Morton*, 542 F.2d 1364 (9th Cir. 1976). Accordingly, we hereby dismiss Charge C of the complaint and vacate the stipulation erroneously entered into by the parties.[4]

[2, 3, 4] It is well established that a mining claimant must discover a valuable mineral deposit before he may receive title to a mining claim located on public land. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *United States* v. *Coleman*, 390 U.S. 599 (1968); *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *Castle* v. *Womble*, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined to require a showing of marketability;

[3] The opinion of Judge Fishman correctly notes that where Congress has expressly so provided, the Department of Agriculture can withdrawn land from mineral entry. *Schaub* v. *United States*, 207 F.2d 325 (9th Cir. 1953); *see also Rawson* v. *United States*, 225 F.2d 855 (9th Cir. 1955). It seems axiomatic that Congress can vest the authority to dispose or limit public access to Federal land in any manner which it deems fit. The discussion in the text, however, is directed to the question whether absent specific statutory authority, the Department of Agriculture is authorized to withdraw from mineral location. The answer is clearly in the negative.

The fact that the Forest Service Manual purports to confirm such authority upon the Forest Service is of no consequence. Administrative manuals adopted by agencies of the Federal Government do not have the force and effect of law. *See Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974). Moreover, it is mere bootstrapping to contend that an agency may delegate to itself powers which it would not have in the absence of the delegation.

[4] The discussion in the text is directed solely to the question whether the issuance of the special use permit had the effect of withdrawing the land from mineral location. We do not here decide to what extent, if any, a patent issued for the land would be subject to the permitted use.

that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. *United States* v. *Coleman*, *supra*. In circumstances, such as the present case, where the land is closed to location under the mining laws subsequent to the location of the mining claim, the claim must be supported by discovery at the time of the withdrawal. *Cameron* v. *United States*, 252 U.S. 450 (1920); *Clear Gravel Enterprises* v. *Keil*, 505 F.2d 180 (9th Cir. 1974); *United States* v. *Henry*, 10 IBLA 195 (1973); *United States* v. *Gunsight Mining Co.*, 5 IBLA 62 (1972); *United States* v. *Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971). Furthermore, if a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate. *United States* v. *Melluzzo* (*Supp. on Judicial Remand*), 32 IBLA 46 (1977); *United States* v. *Bunkowski*, *supra* at 120–21, 79 I.D. at 51–52.

[5] When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant. The Government, however, bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States* v. *Bechthold*, 25 IBLA 77 (1976); *United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975). The Board has stated that prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. The Government does not have to negate the evidence presented by the mining claimant. *United States* v. *Bunkowski*, *supra* at 119, 79 I.D. at 51. If the Government shows that one essential criterion of the test was not met, it has established a prima facie case. *United States* v. *Taylor*, *supra* at 28, 82 I.D. at 75.

Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing. *Humboldt Placer Mining Co.* v. *Secretary of the Interior*, 549 F.2d 622 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977); *United States* v. *Springer*, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, *supra*; *United States* v. *Harris*, 38 IBLA 137 (1978); *United States* v. *Bechthold*, *supra*.

[6] In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when that claimant goes

forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant still bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails. *Foster* v. *Seaton*, *supra; United States* v. *Bechthold*, *supra; United States* v. *Taylor*, *supra.*

In spite of the Assistant Solicitor's clear directive in his 1968 opinion to address the mineral character of Claim No. 2 as of Dec. 21, 1945, and the Forest Service's complaints charging lack of discovery on all claims as of that date, the Forest Service did not present at the 1976 hearing any new evidence of conditions on the claims as of Dec. 21, 1945, which constitutes a prima facie case against each claim. Rather, Milvoy Suchy testified as to the conditions of the claims when he surveyed them. He was not asked to give an opinion as to whether the mineral values on the claims were such as would prompt a prudent man to believe in 1945 that the minerals could be extracted and marketed at a profit. *See United States* v. *Knecht*, 39 IBLA 8 (1979); *United States* v. *Bechthold*, *supra; United States* v. *Blomquist*, 7 IBLA 351 (1972).

Judge Mesch cited the ruling in *United States* v. *Zweifel*, 508 F.2d 1150 (10th Cir. 1975): "If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." 508 F.2d at 1156, n.5. He asserted that "a prima facie case was made by the evidence showing the production and sale of only 25 or 30 tons of pumice between 1940 and 1945."

We find this to be a weak prima facie case. This evidence appeared initially as Contestant's Exhibit No. 2 at the 1964 hearing and no opinion was sought by the Government from witness Suchy as to the effect of those facts on the issue of discovery. While Judge Mesch could properly apply the law to these facts, we note that on the face of the documentary evidence, the notation "1942–1945 (Did not operate, Mr. Williamson in war job)" explains the temporary lapse in sales and rebuts the presumption stated in the *Zweifel* rule.

Judge Mesch stated that the test to be applied in this case, as defined by the Assistant Solicitor in his 1968 decision, is "whether, on the critical date * * *, known conditions were such as reasonably to engender the belief that the land contained mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end." He noted

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that neither party at the 1976 hearing attempted to supply evidence as to whether an estimate of the quantity of useable pumice on the claims could have been made upon the basis of evidence discernible in 1945. He found that the positions taken by the Forest Service at the 1976 hearing [5]

> constitute a recognition or admission that there is no question of quantity or quality and that the only matter for decision is whether, as of the critical date, the lump pumice found on the claims could have been extracted and marketed at a sufficient profit to justify a person of ordinary prudence in spending his time and money mining the pumice. In other words, could sufficient pumice have been marketed at a sufficient profit to justify its exploitation. Under the positions taken by the Forest Service, quantity becomes an issue only if a finding is made that there was a timely discovery.

(Dec. 8–9).

Judge Mesch began his analysis of the evidence as to marketability by examining the production and sales tabulations for the claims during the period 1940–1963. The parties stipulated to these figures at both hearings. He noted that the Forest Service agreed that the production reflected in the tabulations was extracted at a profit but indicated that the record did not show the amount of profit and it was impossible to ascertain the amount from the evidence. Accepting the sales figures as total net profit, he then averaged the values during three periods of time and derived average yearly sales figures of $175 per year from 1940–1945, $1,866.66 per year from 1946–1948, and $1,368.45 per year from 1949–1961. On the basis of these computations he held that it would be "hard to believe that a person of ordinary prudence would have been willing as of Dec. 21, 1945, to invest his time and money to develop the pumice on Claim No. 2 (from which 95 percent of the production came) or to develop any of the other three claims" (Dec. 9–10).

Judge Mesch concluded his analysis of the marketability of the lump pumice in these claims as follows:

> I recognize that evidence of sales or the successful exploitation of a mining claim is not necessary to satisfy the prudent man test. However, with the exception of the evidence showing the production of 25 or 30 tons of pumice in 1940–1941, the general admission by the Forest Service that it was produced at an unknown profit, the implied recognition by the Forest Service that the pumice was of a quality that would have met the market demand, and the fact that there was some market in the United States of an undisclosed extent for pumice, there is nothing in the record showing the conditions that existed as of December 21, 1945, which would have engendered the belief that a sufficient amount of pumice could have been sold at a sufficient profit

[5] The positions of the Forest Service as summarized by Judge Mesch are:

"(1) all of the claims are invalid because they had not been perfected by the discovery of a valuable mineral deposit as of Dec. 21, 1945, and (2) if there was a discovery, it would only validate the east half of Lot 6 of Claim No. 2 because (a) the remaining portions of that claim, all of Claim No. 1, and the north half of Claim No. 3 would be invalid under the theory of excess reserves as of Dec. 21, 1945, and (b) the south half of Claim No. 3 and all of Claim No. 4 would be invalid because the lands were nonmineral in character from the standpoint of the quantity or nonexistence of lump pumice as of Dec. 21, 1945."

(Dec. 6–7). He also notes that contestees were in apparent agreement with these issues.

to attract the efforts of a person of ordinary prudence in extracting and marketing the pumice from the claims.

Without some evidence as of December 21, 1945, relating to (1) the costs of extracting the pumice from the claims, (2) the costs of sorting, bagging, or other processing of the pumice, (3) the costs of transportation, (4) the costs of marketing, (5) the sale prices of pumice for various uses, and (6) the amount of pumice from the claims that might reasonably be expected to enter the market, no one could conclude that a prudent person would have been justified in spending his time and money extracting the pumice from any of the contested claims as of December 21, 1945.

(Dec. 11–12).

Judge Mesch is correct that there is no evidence in the record providing actual production costs and market prices for lump pumice as of Dec. 21, 1945. Appellants assert that Judge Mesch erred in nullifying the claims on this basis. In the context of this case, we agree.[6]

[7] As already stated, the test for discovery is whether conditions are such that a prudent person would be willing to invest time and money in developing a mining claim. Where a withdrawal of the land from mineral location is involved, a claimant must show that such conditions were extant at the time of the withdrawal. In this case, the marketability test requires evidence that the claimed mineral was marketable as of 1945. Location based on speculation that there may be a market in the future for the mineral does not establish discovery. *Barrows* v. *Hickel*, 447 F.2d 80, 83 (9th Cir. 1971).

While reference to sales and receipts for a period of years is certainly relevant to the determination of the existence of a discovery, it cannot be solely determinative of a claim's validity, particularly where, as here, the question concerns the size of a profit and not whether any profitable mining could occur at all.

It is well established that, although a favorable showing of actual sales may demonstrate marketability, lack of such sales is not conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is adduced, by a preponderance of the evidence showing that a prudent individual had a reasonable expectation of his or her ability to extract and market the mineral profitably. *See Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972); *Barrows* v. *Hickel*, *supra* at 82; *United States* v. *Gibbs*, 13 IBLA 382, 391 (1973); *United States* v. *Harenberg*, 9 IBLA 77 (1973).

Inasmuch as evidence indicating a total lack of sales and production

[6] We also wish to note that the Board does not necessarily concur with Judge Mesch's view that a profit of either $1,866 per year or $1,368 per year would not justify a person of ordinary prudence in the expenditure of funds. First, it must be remembered that the claims were subject to mining, due to their topographic situation, for only a small part of the year. (*See, e.g.*, 1 Tr. 213, 259–60, 262). Moreover, a profit of $1,866 in 1946–48 would represent a considerably greater amount of money than it would today. In light of our disposition of this appeal, however, it is unnecessary to determine if such profit, in and of itself, was sufficient to establish the validity of Claim No. 2.

may be overcome by relevant evidence, *a fortiori*, the existence of sales which may be deemed to be insufficient cannot be deemed to conclusively establish the invalidity of a claim.

There may be a number of reasons why any individual claimant might decide to limit production from a claim. Herein, appellants testified that production had purposefully been held to minimum levels in order to avoid heavy investment in an unpatented mining claim (2 Tr. 70–71). This is, of course, a common problem with mining claims, since both individuals and lending institutions are often reluctant to invest great funds in a mining venture in the absence of a patented mining claim. Moreover, the testimony elicited at the hearings gives independent support to appellants' allegations.

The Forest Service stipulated to the profitable sale of lump pumice extracted from Claim No. 2 in 1941. Therefore, it was unnecessary for appellants to produce evidence of profitability by actual cost and market price statistics for that sale. It is clear from the record that after this initial marketing of material from the claim, production was temporarily stopped from 1942–1945 because of World War II.[7]

The court in *Charlestone Stone Products Co., Inc.* v. *Andrus*, 553 F.2d 1209 (9th Cir. 1977), *rev'd in part on other grounds* 436 U.S. 604 (1978), described a similar situation as follows:

> The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.
>
> Since a total absence of operation does not preclude a finding of validity (*Verrue, supra*), it follows that sporadic operation does not preclude a finding for validity.

553 F.2d at 1214–15.

In the present case, there was no abandonment. In fact, Lloyd Williamson and his associates relocated Claim Nos. 1 and 2 during the period of no production to eliminate original locators who were not doing any work on the claims (2 Tr. 67). Previously, they had defended Claim No. 2 against other locators (2 Tr. 74–77; Contestees' Exhibit I,

[7] At both hearings, evidence was produced concerning Lloyd Williamson's activities during World War II. In their statement of reasons appealing Judge Mesch's decision, appellants argue additional facts related to the impact of World War II on their mining activities. The Board has not considered this latter information as part of the record of this case. It is well established that the Board will consider evidence tendered for the first time on appeal only for the limited purpose of determining whether a further hearing is needed. Furthermore, the Board will receive such evidence for that limited purpose only when there is a clear and convincing reason why the evidence was not submitted at the original hearing. *United States* v. *Maley*, 29 IBLA 201 (1977); *United States* v. *MacIver*, 20 IBLA 352 (1975); *United States* v. *McKenzie*, 20 IBLA 38 (1975).

(Continued)

1976 hearing). We know from Clare Williamson's testimony as well as Forest Service evidence that Lloyd Williamson worked in a "war job" from 1942–1945 and as a direct result the claims could not be mined (2 Tr. 164; Contestant's Exhibit No. 2, 1964 hearing). It is also clear from the record that Lloyd Williamson had well-thought-out development plans for the claims which were interrupted by World War II (2 Tr. 65–66, 157–59).

Clare Williamson was questioned about their lump pumice business during the 1942–1945 period of nonproduction.

> Q Now, during the years 1944 and in 1945, as well, we were embroiled in the Second World War. I would assume that there was very little mining operation going on up in that area during that period, is that correct?
>
> A [Clare Williamson] Oh, yes, of course.
>
> Q So, would it be fair to say that you were more or less examining or investigating your possible markets during that year?
>
> A Well, that's true, yes; yes, that's true.

(2 Tr. 157). Since the Williamsons could not actually mine and market the lump pumice on their claims, they clearly did the next best thing, maintain contact with and further develop their market. Williamson testified that she and her husband made numerous inquiries to prospective customers of lump pumice. They received positive responses and requests for samples which they provided. They received unsolicited inquiries as well (2 Tr. 155–57). We conclude that these activities evidence the reasonable response of a prudent person who has a marketable claim but is faced with circumstances beyond his control.

There is additional evidence that suggests that the Williamson lump pumice could have been successfully mined. At the 1964 hearing, appellants introduced a letter dated Aug. 14, 1963, and addressed to Clare Williamson from the president of Charles L'Hommedieu and Sons Co. in Chicago, Illinois, one of her customers (Exhibit 0). The letter reads:

> Lump Pumice Stone was being used to clean and dress polishing and grinding wheels and buffs when I entered this business in 1925. In fact, our records show it was in common use for this purpose when Chas. F. L'Hommedieu & Sons Co. started business in 1898.
>
> In recent years it is also being used to clean grease and residue from abrasive belts and it is our opinion that the demand for this material will continue for many years to come.
>
> At one time Italian Lump Pumice Stone was also used, but this material was harder and heavier than the domestic grade and did not do the cleaning job nearly as well as the Lump Pumice Stone you have been supplying us for many years.
>
> We have had numerous requests from the United States Government for lump pumice stone cut in blocks 4" x 4" x 8" long, which is used for cleaning kitchen grills. Should you ever be in a position to furnish it in this shape, we are certain you would substantially increase your market.

The letter establishes that a general market for lump pumice existed as early as 1898. Contestant's Exhibit 16 (1964 hearing), an article on pumice from the Bureau of Mines Minerals Facts and Problems states that "[p]robably the earliest record of domestic pumice production for abrasive purposes was in 1883."

At least two major reports had been prepared prior to 1945 describing the geological character of the Newberry Crater area of eastern Oregon which includes the Williamson claims. The earliest published report in 1935 was prepared by Howell Williams and entitled "Newberry Volcano of Central Oregon." The second, entitled "Nonmetallic Mineral Resources of Eastern Oregon," was written by Bernard N. Moore and published in 1937. Both reports were introduced by Appellants at the 1976 hearing (Exhibit G) and the Williams report was placed in evidence by the Forest Service at the 1964 hearing (Exhibit 1). The significance of the reports is pinpointed by the testimony of Mr. Miller:

Q I understand. Do you have tabbed the edges of the divider—"Williams, 1935; Moore, 1937; Higgins, 1967; Higgins, 1969; Photos and Maps; History of Claims; and Claim Contest 40 and 41". To what does "Williams, 1935" refer?

A [Mr. Miller] "Williams" refers to the Newberry Volcano of Central Oregon, and he's considered one of the basic underlying reports on that area.

Q The Moore report is referred to up here. Williams first—now we referred to the "Moore, 1937". Is this a publication by Mr. Moore covering this particular area and the pumice development in that area?

A This area was included as a major portion of this—of the pumice section of this report, yes.

Q Do these reports touch upon the economic feasibility of mining pumice as well as the geological existence of the deposits?

A This is the reason for the inclusion of this report. It's the one that went into this—delved into this more than any of the rest of them. The others really just touched upon it. They were more or less in the geology. This report goes into the economics of it.

* * * * *

Q * * * [Were the reports] included in your prepared exhibit to show the conclusions of these writers as to the formation of these pumice deposits, as well as their commercial value and the extent of their existence?

A I put them in primarily to show that the claims were staked in conformity with existing known pumice occurrences. Point 1—they show also that there was every reason to believe there were different types of pumices up there, and it wouldn't be all one mass deposit of similar type pumice; and it was a commercial type.

Q You have included here Howell Williams' map, which is a reprint, I take it?

A I blew this up because I think when you read the normal Howell Williams report, it escapes the average reader that these pumice cones—the one that we have on Claim 4 in the central pumice cone, and the one that was not staked—the one that's in the north—and no longer stakeable—are completely rhyolite pumice cones in their entirety and what you would expect to find in one portion of you would expect to find in the others, and the better section of that is this cross-section which is shown here, and I've colored, again with their code, which shows the central pumice cone as being the main one, and it shows that the obsidian flow that came out one side of it—

it shows where it is and if you look at the staking pattern on this thing, you'll see that these gentlemen must have staked these claims in line with Moore's report and made no attempt to stake areas that didn't involve pumice. They left out the obsidian flow and anything in relation thereto.

(2 Tr. 136–39).

These reports establish that prior to 1945 the existence of significant pumice deposits in the area of the Williamson claims was known. The testimony of Miller with respect to the staking of the Williamson claims and that of both Williamson and Fahey with respect to Lloyd Williamson's familiarity with the reports (2 Tr. 67, 155) indicates that anyone desiring to mine and market lump pumice did have access to information describing the mining and marketing of lump pumice in Oregon prior to 1945. The Moore report which particularly focuses on the quality, use, and market for lump pumice found in eastern Oregon includes a section entitled "Economic Aspects of the Pumice," containing the following statement: "*Lump pumice of possible commercial interest* covers an area of about 3,500 square miles east of the summit of the Cascade Range. There are three different types, which are represented by the older and younger sheets of Crater Lake and *the pumice of Newberry Crater*" (p. 171, italics added). Moore concludes his report with a section on "Development" in which he describes some successful efforts at marketing lump pumice, including one "at considerable profit." He further notes that "[t]he pumice deposits of eastern Oregon are practically undeveloped, probably because of very recent availability of suitable railroad transportation" (pp. 174–75). The inference drawn is that the pumice was suitable for development.

We conclude that the Moore report would have certainly prompted an interested person to explore the Newberry Crater Region and, having located an appropriate claim, investigated the market, and profitably sold from the claim, to reasonably believe that he could profitably develop a lump pumice business. The testimony of Suchy and Miller as well as the Williams and Moore reports show that the lump pumice in the claims is good quality pumice and that the claims contain more than one type of lump pumice, making them adaptable to a variety of commercial uses. The profitable marketing of material from Claim No. 2 in 1941 represents a bona fide beginning to developing a workable mine and inquiry in the following years disclosed further evidence of a continuing market.

Nonmineral in Character

At the beginning of the 1976 hearing, Judge Mesch and Mr. Reifenberg, counsel for the Forest Service, agreed, without comment from Mr. Morrell, counsel for appellants, that there are really two issues encompassed by the Forest

Service charge that portions of Claim No. 2 and all of Claim Nos. 1, 3, and 4 are nonmineral in character (2 Tr. 5–6). They assert that the lands embraced by the S ½ of Claim No. 3 and all of Claim No. 4 are nonmineral in the sense that they are not mineral in character because of an insufficient quantity of lump pumice to justify consideration as a valuable mineral deposit and also that, assuming the validity of some of the claims, certain lands are nonmineral because of excess reserves which make the lump pumice unmarketable.

[8] Mineral in character and excess reserves can be seen as differing facets of a single concept. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. *United States* v. *Meyers*, 17 IBLA 313 (1974); *United States* v. *McCall*, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is the normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. *Id.* Thus, to the extent that a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

[9] Questions relating to excess reserves, though they are interrelated to a determination of the mineral character of land, arise in a different context. The charge of invalidity due to the presence of excess reserves *admits* that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral in other claims owned by a mining claimant, the mineral in certain claims would have no market and thus is essentially valueless.

The value of all minerals, with the possible exception of intrinsically valuable minerals such as gold and silver, is directly related to the market for the minerals. Thus, if we assume that the market for a mineral is 1,000 tons a year, an individual with a supply of 10,000 tons would be capable of fulfilling market requirements for the next 10 years. In the first year, the value of an initial 1,000 tons is the market value. The value of the subsequent tonnage, however, is discounted owing to the inability to market it immediately. This is not to say that the remaining 9,000 tons is valueless. Rather, each ton's relative present value declines depending upon how long it is necessary to wait until it can be marketed. If, however, we assume that the mining entity has a total supply of 1,000,000 tons of mineral, but that the market will still only absorb 1,000

tons a year, it will be seen that a vast amount of the tonnage effectively has no present value. If we assume a static market demand, it will take 1,000 years to market the entire mineral supply. The present value of earnings a millenium in the future can safely be viewed as zero.

This is the problem with which the concept of excess reserves deals. If an individual has an admittedly valid mining claim which itself contains reserves sufficient to meet the reasonable market demand, giving due consideration to foreseeable expansion and contraction thereof, for a period in excess of 50 years, additional deposits of the same mineral, located by the same individual, effectively have little or no *present* value. Since present value is the benchmark of the marketability test, such additional claims are not valid. *United States* v. *Baker*, 23 IBLA 319 (1976); *United States* v. *Bunkowski*, *supra*; *United States* v. *Anderson*, 74 I.D. 292 (1967).

Review of the 1976 hearing transcript suggests that the Forest Service did concede that the mineral existed on Claims Nos. 1, 2, and 3. With respect to Claim No. 2 it is clear that it did not wish to challenge existence of the mineral but rather was claiming that there were excess reserves within the claim's boundary. Prior to presenting the contestees' witness, Mr. Morrell moved to strike the charge as to nonmineral character of portions of Claim No. 2:

MR. MORRELL: All right. Now, likewise, with regard to 011735, Paragraph V, Subdivision (b), the Contestees do move the Court to strike from the complaint, that charge that a portion of the claim made up of Lots 3, 4, 5, 7 and the west half of Lot 6 is non-mineral in character, be stricken. Now, that is referring—those lots are lot numbers referring only to Claim No. 2 and we feel that there has been no evidence at all introduced here to support that charge.

JUDGE MESCH: Mr. Reifenberg?

MR. REIFENBERG: If it is still understood that our reserve question remains in the case, then I would have no objection to the move.

JUDGE MESCH: Let me say this, Mr. Morrell: I have to write a written decision in the case, after I have studied all of the evidence. I had intended simply to pretty much ignore the issues—the charges as stated in the two complaints, and simply point out in my decision what the issues were to be decided in this case. One of them would be the—whether the south half of Claim No. 3 and all of Claim No. 4 is non-mineral in character from the standpoint of the absence of any showing of quantity within the lands. Now, that is stated very roughly, but I would pose that as an issue. So with that, if you want to proceed further with the charges in the complaint, it's all right. I just wanted to mention what my thinking was.

MR. MORRELL: Well, we felt that the charge in the complaint that it is non-mineral in character not only was not proved, but that the contrary was proved by the witness, Suchy, that Lots 3, 4, 5, 7, and the west half of Lot 6 were all mineral in character, generally; and I don't know what

that means, but I—everybody seems to have a different idea of what that means, but it is something that my—I believe they had the burden of proving that and I don't think they have made the grade, and for that reason, I do not want to overlook making my record.

JUDGE MESCH: Very well. Disregarding the question of excess reserves, I would agree with you.

MR. MORRELL: All right.

JUDGE MESCH: At least today. I don't know what there is in the previous hearing, but at least today, there has been no evidence presented that the lands described in Charge V(b) are non-mineral in character. But at the beginning of the proceeding, Mr. Reifenberg, in effect, indicated he wasn't making that allegation, other than from the standpoint of excess reserves.

(2 Tr. 41–43).

[10] A charge that lands are nonmineral in character does not necessarily give rise to a claim that there are excess reserves, since it is normally premised on a total lack of mineralization, as indeed, the Government contends exists on the S ½ of Claim 3 and all of Claim 4. In a mining contest a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected. *United States* v. *McElwaine*, 26 IBLA 20 (1976); *United States* v. *Northwest Mine & Milling, Inc.*, 11 IBLA 271 (1973); *United States* v. *Pierce*, 3 IBLA 29 (1971). The excess reserve issue in this case was raised in the Forest Service statement of issues submitted to Judge Mesch prior to the hearing. Appellants received a copy of the statement and therefore they had notice of the issue. Since they made no objection at the hearing, we conclude that they have not been prejudiced by the failure to specifically charge in the complaint that there were excess reserves within the claims. *United States* v. *Northwest Mine & Milling, Inc.*, *supra*.

While it is clear from the record that there was lump pumice on Claim No. 2 sufficient to warrant a prudent man to expect that he could profitably extract the mineral, the record is not clear as to what is the full extent of the quantity of the pumice on the claim. Suchy estimated that there was a half million tons on Claim No. 2 (*compare* 1 Tr. 42 *with* 2 Tr. 18). That estimate and his methods of reaching it were disputed by claimant's experts. (*See*, *e.g.*, 1 Tr. 149). No other estimates for the entire claim were proffered, however.

Judge Mesch noted that the evidentiary record indicated that only a total of 650 tons of pumice had been marketed over a period of 24 years. Were we to base our estimates of the reasonably foreseeable market solely on the basis of past production, it would be clear that the amount of pumice solely on Claim No. 2 would be greatly in excess of that which might reasonably be deemed to have any present value. There are other factors, however, which we feel are properly considered in making this determination.

First, we have noted that the testimony of Suchy was criticized by certain of appellants' witnesses. As

an example, in the 1964 hearing Suchy had testified that 50 to 60 thousand tons of marketable pumice existed on the east half of Lot 6, consisting of 17 acres (1 Tr. 42). The east half of Lot 6 had not been contested by the Forest Service at the time of the 1964 hearing. Leslie C. Richards, who the Government had stipulated was an expert witness (1 Tr. 16), estimated that the total amount of merchantable pumice in the east half of Lot 6 was 8,500 tons (1 Tr. 153–55). Thus, the Government's estimate was over 500 percent greater than that of appellants' expert.

Second, we have already made reference to appellants' assertion that they purposefully held down production. In the 1976 hearing, appellants submitted a copy of a letter from the Buying Department of the Procter & Gamble Co., requesting a copy of their price indications based on an estimated rate of 2,700 tons a year (2 Tr. 121, Exhibit E). Given the wide variance in the estimated quantities of the pumice, plus the reasonable anticipation of an increased market for the mineral should the production facilities be upgraded, we are unable to say that excess reserves existed within the physical boundaries of Claim No. 2.[8]

When we examine the other claims, however, it seems apparent that any reasonably foreseeable market increase would be more than adequately supplied by the material found on Claim No. 2. Suchy testified that there were 500,000 tons of usable pumice on Claim No. 1, and 250,000 tons on Claim No. 3 (2 Tr. 18). Suchy provided no estimate as to Claim No. 4, probably owing to the fact that he found no usable pumice within the limits thereof (2 Tr. 13). It is unnecessary for us to decide whether lump pumice does, in point of fact, exist on Claim No. 4, inasmuch as we feel that it is clear that any pumice deposits which are located on other claims would clearly be in excess of any foreseeable market demand.

Assuming that only half of the pumice estimated by Suchy actually existed in Claim No. 2, and assuming appellants were able, on a *yearly* basis to produce 3,000 tons (which we note is more than four times their *total* production to date), the mineable reserves should last for over 83 years. Any additional reserves would have so attenuated a value that they could scarcely be said to possess any present value whatsoever. Thus, we have no recourse but to hold that Claims Nos. 1, 3, and 4 are invalid since the minerals embraced within their limits have now, and had in 1945, no present value.

[11] Since the primary purpose of validating a claim is so that the minerals can be extracted and marketed, appellants must

[8] In light of our disposition, we do not now pass on the question of whether the existence of excess reserve within a single claim in which a discovery exists, can serve as a predicate for a declaration of invalidity as to those positions which are excess.

also show that marketability has continued since discovery and that the minerals can presently be profitably extracted. *United States* v. *Harenberg*, *supra*. The record provides considerable evidence of development of the claims since 1945 to support a conclusion that Claim No. 2 is presently valuable for lump pumice. By stipulation of the parties, lump pumice from the claim has been continuously marketed at a profit since 1946. It sells for a variety of commercial uses. Although appellants have limited production up to this time because they have no patent and because of Forest Service requests to restrict their activities, they have investigated the market and have additional customers whose business may be available to them (2 Tr. 120–22, 125). We find no evidence in the record which would substantiate a finding of a lack of present marketability.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to Claims Nos. 1, 3, and 4 and reversed as to Claim No. 2 which is hereby held to be valid in its entirety.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Chief Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I concur in the main opinion except as indicated below.

This opinion recites in part that "issuance of a [Forest Service] special use permit could not operate to withdraw the land from mining or mineral location. *A. W. Schunk*, 16 IBLA 191, 81 I.D. 401 (1974)."

As stated in *Schunk*, the Forest Service Manual, sec. 2811.25, recites that lands used or occupied under a special land use permit are ipso facto closed to mineral entry.

Both of these positions, enunciated as universal principles, are not correct. I adhere to the rules enunciated in *Schunk* that a special use permit, issued by the Forest Service for a privately-owned electric transmission line does not close the land to mineral entry.

We also pointed out in *Schunk* that the Forest Service Manual relies on *United States* v. *Mobley*, 45 F. Supp. 407 (N. D. Calif. 1942), and *Schaub* v. *United States*, 207 F.2d 325 (9th Cir. 1953), as supporting its conclusion that the issuance of such a permit closes the land to mineral entry. In *Schunk*, we stated that *Mobley's* discussion of the issue was obiter dicta, since the court found that the mining claim was null and void for lack of a discovery of a valuable mineral.

Schunk discussed *Schaub* at 81 I.D. at 403 as follows:

> In *Schaub* a material site had been designated for use in connection with Federal Aid Highway construction under 23 U.S.C. § 18 (1946), now § 317 (1970). The material pit was also designated for

special use under the Act of March 30, 1948, 62 Stat. 100 (formerly 48 U.S.C. § 341 (1954). Under that Act, the Secretary of Agriculture may authorize use of national forest lands in Alaska for various purposes:

"* * * and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: * * *."

The Court held that the federal use of the lands for material site purposes effectively closed the lands from further appropriation.

In *Schaub* the mineral claimant sought to acquire mineral materials which were then being mined by or for the United States for federal use.

The Forest Service issues special use permits for virtually every kind of occupancy.[1]

Thus it appears that a special land use permit is effective to bar mining locations where the applicable statute authorizing the issuance of the permit constitutes the issuance thereof as an appropriation of the land. This is not to say that other circumstances attending the issuance of a special land use permit may not bar mining locations. For example, if the Forest Service issued a special land use permit for the construction of a hotel, which was built, we probably would be hard put to deny that the situs of the hotel was closed to mining. *See United States* v. *McClarty*, 17 IBLA 20, 50–53, 81 I.D. 472, 485–7 (1974); *John W. Pope*, 7 IBLA 73 (1974).

FREDERICK FISHMAN,
Administrative Judge.

[1] 36 CFR 251.1 provides in part as follows:

"(a) *Special uses.* (1) All uses of national forest lands, improvements, and resources, including the uses authorized by the act of March 4, 1915 (38 Stat. 1101), as amended July 28, 1956 (Pub. L. 829, 84th Cong.; 70 Stat. 708; 16 U.S.C. 497), the act of March 30, 1948 (62 Stat. 100, 48 U.S.C. 341), and section 7 of the act of April 24, 1950 (64 Stat. 84; 16 U.S.C. 580d), and excepting those provided for in the regulations governing the disposal of timber and the grazing of livestock or otherwise specifically authorized by acts of Congress, shall be designated 'special uses,' and shall be authorized by 'special use permits.'

* * * * *

"(c) *Other authorizations.* The Chief of the Forest Service is also authorized to issue permits, execute leases, and grant easements as follows:

"(1) Permits under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431, 432), for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity in conformity with the uniform rules and regulations prescribed by

(Continued)

the Secretaries of the Interior, Agriculture, and War, December 28, 1906 (43 CFR 3.1 to 3.17).

"(2) Leases of land under the act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), in such form and containing such terms, stipulations, conditions, and agreements as may be required in the public interest.

"(3) Easements for rights-of-way for poles and lines, including telephone and telegraph lines, for communication purposes, and for radio, television, and other forms of communication transmitting relay, and receiving structures and facilities, under the provisions of the act of March 4, 1911 (36 Stat. 1253, 16 U.S.C. 523), as amended by the act of May 27, 1952, (Pub. L. 367, 82d Cong., 2d Sess., 66 Stat. 95), subject to such payments as maybe equitable and to such stipulations as maybe required for the protection and administration of the national forests.

"(4) Permits, leases, and easements as authorized by the act of September 3, 1954 (Pub. L. 771, 83d Cong.), to States, counties, cities, towns, townships, municipal corporations, or other public agencies for periods not in excess of 30 years, at prices representing the fair market value, fixed by the Chief, Forest Service, through appraisal, for the purpose of constructing and maintaining on such lands public buildings or other public works."

APPEAL OF THE HOLLOWAY COMPANIES

IBCA-1182-3-78

Decided *February 11, 1980*

Contract No. 6-07-DC-7150, Specifications No. DC-7175, Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Disputes and Remedies: Equitable Adjustments

Where, under the standard Differing Site Conditions Clause of the contract, a construction contractor claims entitlement to increased costs caused by heavy rains or other adverse weather conditions, and the undisputed facts indicate no fault on the part of the Government, the contractor has failed to state or prove a claim upon which relief may be granted.

APPEARANCES: Mr. Dan Holloway, President, The Holloway Companies, Wixom, Michigan, for appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This case concerns a claim by a construction contractor (Holloway or appellant) for alleged extra costs incurred primarily because of 2 days of excessive rainfall in June 1977 based upon Clause 4 of the General Provisions of its standard construction contract with the Bureau of Reclamation (Bureau).

The contract was dated Jan. 16, 1976, and required Holloway to construct and complete Palmetto Bend Dam, on the Navidad River near Edna, Jackson County, Texas, in accordance with the associated specifications. The estimated contract price was $24,911,492.

By letter of June 16, 1977, Holloway furnished notice to the Bureau of delay due to excessive rainfall on June 15, 1977, and requested an extension of the contract completion time equivalent to the number of days it took to restore the construction site to the condition of the site prior to June 15, 1977. In addition, the contractor requested additional compensation for labor, equipment, and materials used to restore the construction site.

In his Finding of Fact and Decision, dated Jan. 10, 1978, the contracting officer found from official records of the Government weather station, located at Victoria, Texas, which is approximately 25 miles from the construction site, that:

1. For the 30-year period from 1941 through 1970, the normal precipitation for the month of June is 3.31 inches;

2. The total precipitation for June 1977 was 12.21 inches, which is a departure from the normal of 8.90 inches or 269 percent above normal; and

3. On June 15, 1977, the rainfall was 9.3 inches.

From the project records, the contracting officer determined:

1. That during an 18-hour time period from 5 p.m. on June 14, 1977, to 11 a.m. on June 15, 1977, approximately 9 inches of rain fell at the construction site;

2. That flooding of the construction ensued;

3. That the contractor began cleaning up and repairing the damage resulting from the flood on June 16, 1977;

4. That the contractor was able to restore the construction site to its condition prior to the excessive rainfall by June 29, 1977; and

5. That during the 14-calendar day time period from June 15 through June 28, 1977, the contractor was not able to pursue normal construction activities.

Based on the foregoing findings, the contracting officer awarded the contractor an extension of 14 calendar days to the time for completion of the contract work. This award was made on the ground of excusable cause for delay under the provisions of Clause 5 of the General Provisions of the contract.[1] However, because there was no provision therefor in the contract, the contracting officer denied the contractor's request for additional compensation for costs associated with the cleanup and repair of the flood damage. The contractor appealed to this Board from the contracting officer's denial of payment for the claimed costs.

In a letter to the Bureau, dated Feb. 21, 1978, treated as its notice of appeal, Holloway stated:

> We accept the fourteen (14) days allowed for an extension of time as stated in your decision. However, we feel that we are entitled to some monetary compensation. We feel that through no fault of this contractor or failure of facilities provided to protect the work, we suffered damage, not only to the site, but to the permanent work also. We believe that this occurrence was of such a nature, that it exceeds the intent expressed in the contract documents.

Although Holloway failed to file a complaint within the time required by the procedural regulations, the Board, by its order of May 3, 1978, extended the time 30 days for Holloway to file its complaint. The complaint was filed on

[1] Clause 5 is entitled, "TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS." Paragraph (d) thereof provides as follows:

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargos, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

"(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

"The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions."

(Continued)

May 24, 1978. It consisted of general allegations of adverse weather conditions encountered during the construction project, confirmation of the contracting officer's finding that 14 calendar days were required to restore the site to a workable condition, and a general description of work performed to accomplish necessary dewatering, reexcavation and cleanup. The crux of the complaint was contained in the following paragraph:

> We believe that the hardships created by the period of weather from November 15, 1976 to March 12, 1977 and the unexpected downpour of June 14 and 15, 1977 constitute a changed site condition. Both of these happenings were unknown physical changes at the site. Both of these events vastly altered our approach to the construction of this Project. Clause 4 of the General Provisions provides for such differing site conditions.

The final paragraph of the complaint contained a request for the "sum of $53,841.53 as monetary compensation for the cleanup and restoration of the site to a workable condition after the downpour of June 14 and 15, 1977."

By its answer, the Government admitted the allegations of the complaint, except it denied that the weather events described in the complaint constituted a differing site condition and denied that such events entitled the appellant to additional compensation. The Government requested that the Board deny the subject appeal for failure to state a claim for which relief may be granted.

The appeal was submitted for decision on the record without a hearing pursuant to an order of the Board settling the record.

Discussion

No issue of fact is presented by this appeal and the only issue of law involved is whether a construction contractor is entitled to a monetary payment for alleged additional costs incurred as a result of adverse weather conditions under Clause 4, Differing Site Conditions, of the General Provisions of the standard construction contract, Form 23–A.[2]

As pointed out in the Government's brief, the law is well settled: that a contractor may not recover increased costs which result from adverse weather conditions, absent a contract provision which allows it; and, that weather conditions,

[2] Clause 4 provides:

"4. DIFFERING SITE CONDITIONS

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

"(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

whether normal or unusually severe, do not constitute a differing site condition under Clause 4 of the General Provisions of the standard construction contract.

For example, in *Arundel Corp. v. The United States*, 103 Ct. Cl. 688 (May 7, 1945), *cert. denied*, Oct. 15, 1945, and *rehearing denied*, Nov. 13, 1945, involving a dredging contract, the Court of Claims held that the action of a hurricane was not a changed condition under Article 4 of the contract which would entitle plaintiff to an increase in the unit price because of the increased cost due to the decreased amount of work. In *Charles T. Parker Construction Co.*, IBCA–335 (Jan. 29, 1964), 71 I.D. 6 at p. 10, 1964 BCA par. 4017 at pages 19,792 and 19,793, this Board stated:

> It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such loss to the Government, the contractor is obligated to repair the damage at its own expense.

Other decisions by this Board to the same effect include: *Concrete Construction Corp.*, IBCA–432 (Nov. 10, 1964), 71 I.D. 420, 65–1 BCA par. 4,520; *Montgomery-Macri Co. & Western Line Construction Co.*, IBCA–59 and IBCA–72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3,819; and *Appeal of M & P Equipment Co.*, IBCA–1088–11–75 (Sept. 28, 1979), 86 I.D. 527, 79–2 BCA par. 14,094.

Decision

Based upon the undisputed facts in this case and the above-cited authorities, we hold that appellant has failed to allege or prove a claim for which relief may be granted.

Accordingly, the appeal is denied.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

CONSOLIDATION COAL CO.

2 IBSMA 21

Decided *February 13, 1980*

Appeal by Consolidation Coal Co. of Administrative Law Judge William J. Truswell's decision on remand of IBSMA 79–25 upholding entry by an OSM inspector without prior presentation of credentials on the basis that extraordinary circumstances existed for doing so. (Docket No. IN 9–9–R; IBSMA 79–25.)

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections

Where extraordinary circumstances exist an entry made by an inspector without prior presentation of credentials complies with the requirements of 30 CFR 721.12(a).

APPEARANCES: Daniel E. Rogers, Esq., Senior Counsel, Pittsburgh, Pennsylvania, for Consolidation Coal Co.; Shelley D. Hayes, Esq., and Marcus P.

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McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Consolidation Coal Co. (Consolidation) has appealed Administrative Law Judge Truswell's Nov. 28, 1979, decision on remand of IBSMA No. 79-25.[1] In that decision we construed 30 CFR 721.12(a) to require an Office of Surface Mining Reclamation and Enforcement (OSM) inspector to present credentials at the earliest practical opportunity except under extraordinary circumstances. We remanded so that a determination could be made whether or not sufficient conditions existed in this case to warrant entry without a prior presentation of credentials.[2]

The Administrative Law Judge recounted the facts pertinent to this question in his decision:

> Inspector Marvin Utsinger testified: that on his initial inspection of November 8, 1978 he noticed somewhat of an odd occurrence in that while it had been dry for several days he did not expect to see water flowing in the ditches (Tr. 10); that there was evidence that there had been pumping in the ditch area just prior to his observation (Tr. 15); that "it looked like the pump had just been pulled out of there" (Tr. 15); that "there was still some sections of drain pump hose in the ditch and the pump hose was wet" (Tr. 15); that it appeared pumping had ceased shortly before he arrived at that point (Tr. 16); that the ditches were approximately ten minutes travel time away from the mine office (Tr. 10); and, that while it is his normal procedure to check in at the mine site office and identify himself before making an inspection he did not do that on November 20th because he felt the pump would have been turned off while he was at the mine site office (Tr. 19).
>
> Mine superintendant [*sic*] Charles Richard Clinton testified that he has a radio in his office, is in instant communication with the whole mine, and the pump in question could be shut down in 5 minutes if somebody was on the south side of the mine (Tr. 58-59).[3]

[1] As is indicated in the decision on remand, Consolidation states that these facts are sufficient to bring the case within the scope of an "extraordinary circumstances" exception.[4] Counsel for Consolidation adds that he "frankly [does] not see any way that I could counter that evidence since it all depends upon Marvin Utsinger's state of mind."[5] We stated in our original decision, however, that whether or not extraordinary circumstances exist does not depend merely on the inspector's state of mind: "We assume extraordinary circumstances will be rare and that OSM will be able adequately to demonstrate such existed if there are challenges to enforcement actions based on entry without presentation of creden-

[1] 1 IBSMA 273, 86 I.D. 523 (1979).

[2] IBSMA 273 at 277-78, 86 I.D. 523 at 525-26 (1979).

[3] Decision at 1-2.

[4] "[C]ounsel for applicant advised: 'If you are to follow the Board's rationale to the letter, I do not think that any further hearings on the matter are necessary * * *. Under the Board's rationale I believe there is sufficient evidence on the record to find that Mr. Utsinger's entry on November 20 was a lawful entry.'" Decision at 2.

[5] Decision at 2. This statement was apparently based on a misunderstanding of the Board's original decision.

tials."[6] Right-of-entry without prior presentation of credentials is warranted in order to minimize instances in which an operator's violation may escape detection.[7] Each case where such an entry occurs must be measured against its own facts to determine whether, objectively, entry without prior presentation of credentials was justified.

The Administrative Law Judge concluded the facts in this case indicate that there were extraordinary circumstances which warranted an entry without prior presentation of credentials. Our review has revealed no reason to disturb that conclusion. The decision on remand is therefore affirmed.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

LITTLE SANDY COAL SALES

2 IBSMA 25

Decided *February 19, 1980*

Appeal by Little Sandy Coal Sales from that part of a Sept. 20, 1979, decision by Administrative Law Judge William J. Truswell, upholding the validity of Violation No. 1 of Notice of Violation 79–II–29–13 (Docket No. NX 9–56–R) issued by the Office of Surface Mining Reclamation and Enforcement pursuant to the Surface Mining Control and Reclamation Act of 1977.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve approximate original contour. If a highwall has not been eliminated, it necessarily follows that return to approximate original contour has not been accomplished.

APPEARANCES: Edgar B. Everman, Grayson, Kentucky, for Little Sandy Coal Sales; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Little Sandy Coal Sales (Little Sandy) has appealed part of a deci-

[6] 1 IBSMA 273 at 277; 86 I.D. 523 at 525 (1979).

[7] As we noted in our original decision: "[T]here is no question that the Department contemplated legal entry in some circumstances where no prior presentation of credentials would be advisable or capable of being performed. Comment 11 to Part 721 reads, in part, as follows:

"It is not intended that inspections be restricted to 'normal business hours' if the exigencies or violations justify inspection at other times. An example would be attempts to

(Continued)

detect illegal discharges or other night-time activities which are prohibited by the Act or regulations. 42 FR 62664 (Dec. 13, 1977)."

1 IBSMA 273 at 276, n.2; 86 I.D. 523 at 525 (1979), n.2.

sion of Administrative Law Judge William J. Truswell, dated Sept. 20, 1979, upholding the validity of three violations in Notice of Violation No. 79–II–29–13 (Notice of Violation No. 1) and one violation in Notice of Violation No. 79–II–28–12 (Notice of Violation No. 2). Little Sandy indicated in its brief to the Board that the only violation appealed was Violation No. 1 of Notice of Violation No. 1. The violation was described in the notice as a failure to eliminate a highwall and to restore a portion of the disturbed area to its approximate original contour (AOC) as required by the backfilling and grading requirements 30 CFR 715.14.

We have reviewed the record in this case and agree with the conclusion below concerning Violation No. 1. We affirm.

Factual and Procedural Background

On Apr. 30, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited a surface mine in Carter County, Kentucky, and issued Notice of Violation No. 1 to Little Sandy pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Tr. I 12–13).[1] At that time there was no mining activity, and no equipment was on the site (Tr. I 10–11). The notice listed three violations of the initial Federal general performance standards.[2] Violation No. 1 was an alleged backfilling and grading violation which is the subject of this appeal.

On May 14, 1979, Little Sandy filed an application for review of this notice. One week later Ford Energy Corp., designated as the operator on the notice of violation, also filed an application for review of the same notice. On June 11, 1979, an OSM inspector visited the minesite again and terminated all the violations in Notice of Violation No. 1. He indicated on the termination notice (Exh. R–3) that Violation No. 1 was terminated because it had been abated.[3] This inspector and the OSM inspector who originally issued Notice of Violation No. 1 returned to the site on June 22, 1979, and issued Notice of Violation No. 2 containing one violation for allegedly failing to eliminate the highwall and failing to return to AOC the same area encompassed by Violation No. 1 of the previous notice.

On June 25, 1979, Little Sandy applied for review of the second notice and also sought temporary relief from its requirements. A hearing was held on July 2, 1979, at the conclusion of which OSM agreed to extend the abatement period from July 16 to Sept. 20, 1979, and not to assess a civil penalty or history point for the second notice of violation.

A hearing on the merits of the violations contained in the two no-

[1] 30 U.S.C. § 1271(a)(3) (Supp. I 1977). ("Tr. I" refers to the transcript of the July 2, 1979, temporary relief hearing and "Tr. II" to the transcript of the hearing held on August 20, 1979).

[2] 30 CFR Part 715.

[3] He testified at the July 2, 1979, temporary relief hearing that at that time he did not have a copy of the notice with him and that he understood that the remedial action required was elimination of the highwall (Tr. I 51).

tices of violation was held on Aug. 20, 1979, and on Sept. 20, 1979, a decision was issued sustaining all the violations in the two notices. Little Sandy filed a timely appeal; Ford Energy Corp. did not.

Discussion

[1] Little Sandy was cited by OSM for failing to eliminate the highwall and failing to restore the area to AOC. Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve AOC.[4] If a highwall has not been eliminated, it necessarily follows that return to AOC has not been accomplished. Therefore, the resolution of this appeal turns on the question whether the highwall had been eliminated on Apr. 30, 1979.[5]

The OSM inspector who issued Notice of Violation No. 1 on Apr. 30, 1979, testified that it "visually was pretty obvious" that the area had not been returned to AOC. The inspector took slope readings which confirmed that the observed slope was steeper than the premining slope (Tr. I 17–18). OSM and State officials were in agreement that the highwall had not been eliminated in April 1979 (Exh. R–16; Tr. II 79–81). An OSM inspector reported that on June 22, 1979, when Notice of Violation No. 2 was issued, Little Sandy "had pretty well gotten to eliminating the highwall," but that it had not restored the area to AOC (Tr. I 16; Tr. II 21–23). A State inspector's report for the same day indicated that the highwall had not been eliminated and the area had not returned to AOC (Exh. R–17; Tr. II 82–88).[6]

The testimony of the OSM inspector who issued Notice of Violation No. 1 and the evidence that OSM and the State were in agreement concerning the existence of a backfilling and grading violation were adequate to establish that Little Sandy had not eliminated the highwall and returned the area to AOC on Apr. 30, 1979. Little Sandy failed to provide sufficient evidence to the contrary.

Little Sandy also argues that OSM should have recognized a 6-month extension of a State notice of noncompliance and order for

[4] The relevant part of 30 CFR 715.14 reads as follows:

"In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material *to eliminate all highwalls*, spoil piles, and depressions. * * * The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a)" (italics supplied).

[5] The parties offered conflicting expert testimony from registered professional engineers concerning premining and postmining slope readings (Tr. I 78–84, 113–115; Exh. R–6; Tr. II 119–120, 131–133; Exh. A–5). Much of the disagreement resulted from differing methods of on-ground measurement (Tr. II 156–158, 178–181; Exh. A–5). However, because of the basis of this opinion, it is not necessary to sort out these differences in this case.

[6] The State inspector began inspecting Little Sandy's operation in July 1978 and had made about 25 visits to the site at the time of the hearing (Tr. II 69–70). During September 1978 the inspector filed two inspection reports which informed Little Sandy of the necessity of eliminating the highwall and returning the area to AOC (Exh. R–11 and R–12). The State issued a notice of noncompliance and order for remedial measures on Oct. 5, 1978, requiring Little Sandy to eliminate the highwall and achieve AOC (Tr. II 72; Exh. R–20).

remedial measures which was granted on Dec. 11, 1978, by the Kentucky Department of Natural Resources and Environmental Protection. The extension was to allow Little Sandy to complete reclamation of the site, including returning the area in question to AOC. While Little Sandy might view the enforcement action taken by OSM during the period of the State extension to be unwarranted, there is no doubt that OSM had the authority to take such action. In *Eastover Mining Co.*, 2 IBSMA 5, 87 I.D. 9 (1980), the Board held that OSM is authorized to issue a notice of violation even if the state has already initiated enforcement action for the same violation.

Our review of the record reveals no reason to overturn the Administrative Law Judge's conclusion concerning the first backfilling and grading violation. Therefore, that part of the decision appealed from is affirmed.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

ESTATE OF LEONA HUNTS ALONG HALE

8 IBIA 8

Decided *February 20, 1980*

Appeal from order by Administrative Law Judge Daniel S. Boos approving will and ordering distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the agency clerk to whom decedent dictated her will had known the decedent and her family since the clerk was 10 years old, and the clerk's testimony established that the testatrix knew the nature and extent of her property, remembered and discussed the personal situations of each of her children, and had made a testamentary plan by which she wished to distribute her property, the fact that one of her children benefited more than any of the others did not tend to show the decedent lacked testamentary capacity, nor was the testamentary plan unreasonable.

2. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the witnesses to an Indian will were nurses at the hospital where decedent spent her last illness and testified that they had observed her conduct as a patient and her behavior with her family and felt her to be competent and able to understand what she was doing when she made a will, the reluctance of decedent's attending physician to commit himself to an opinion concerning the ability of decedent to understand "legal documents" did not tend to contradict the nurses' testimony that decedent was competent to make a will, nor did it indicate that decedent lacked testamentary capacity.

APPEARANCES: Robert W. Holte, Esq., for appellants Edward O. Hale and Timothy Hale; James P. Fitzsimmons, Esq., for appellee Sherman Hale.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On June 21, 1977, Leona Hunts Along Hale, the beneficial owner of

interests in trust real property, died at Minot, North Dakota, at the age of 65. She was survived by 6 children, whose ages ranged from 47 to 19 at the time of her death. Her will dated June 17, 1977, was approved by the Administrative Law Judge's order on Apr. 9, 1979. Appellant Edward Hale, her oldest son, is bequeathed $1 by the will, as is one of his sisters. Appellant Timothy Hale, together with another of appellants' sisters, is named devisee of a questioned interest in two lots and a house not included in the trust property in probate by the Department. Appellee Sherman L. Hale, the youngest son, is the principal beneficiary of the will and the named devisee of decedent's interest in 15 trust allotments, as well as any residual property not specifically described. A third daughter of decedent is named devisee of decedent's interest in allotment No. 668A which was subject to sale at the time of the making of the will. A codicil to the will also published on June 17, 1977, which appears on the "Affidavit to Accompany Indian Will" form provided by the Department, provides for conditional bequests to five named beneficiaries of income from the possible sale of decedent's interest in allotment No. 668A.

At a series of probate hearings on Apr. 18, Sept. 19, and Nov. 30, 1978, appellants sought to show decedent lacked testamentary capacity on the day she made her will. On appeal they urge the order approving will should be vacated and the will held invalid for the same reason.

Although testamentary capacity is the sole issue specified on appeal, appellants rely upon six circumstances to support their position. Thus they contend that (1) the record does not affirmatively show decedent asked for help from the agency in drafting a will, and suggests the agency assistance was procured by others acting improperly; (2) the demonstrated reluctance of the subscribing witnesses to attend the probate hearings indicates their testimony was not worthy of belief and the testimony of the attending physician should be relied upon instead to show decedent lacked testamentary capacity; (3) decedent failed to supply sufficient reasons to explain her testamentary scheme, a circumstance that indicates she did not know the extent of her property; (4) the testamentary plan is irrational and inconsistent with decedent's demonstrated affection for appellants; (5) the appearance of the signature made on the will indicates, when compared with signatures made by decedent 10 years before, the decedent was no longer competent; and (6) the testamentary scheme itself is so unnatural as to shock the conscience and require distribution according to the statutory provisions used in cases of intestate succession. Since the first five points are primarily factual, the last contention is first addressed.

[1] The limitations imposed upon an Indian testatrix to dispose

of her trust property are defined by the holding in *Tooahnippah* v. *Hickel*,[1] which indicates that a will executed in conformity to Departmental regulation is valid, absent proof of the successful imposition of the will of another for that of the testatrix.[2] The Secretary is without power to rewrite wills otherwise in conformity to Departmental regulation, simply because the testamentary scheme does not conform to popular or personal notions of fitness.[3]

Some of appellants' first five points do touch upon whether there was an attempt to influence decedent improperly, as well as the question of her capacity. Accordingly, both issues are considered in the following review of contentions 1 through 5.

(1) *The agency clerk.* Since she was about 10 years of age, the clerk assigned by the agency to prepare the will had known decedent. The clerk and decedent's daughters had played together and gone to school together. At the hospital on June 17, 1977, decedent and the clerk were alone together in decedent's room while they discussed the contents of decedent's will. Decedent dictated the will terms while explaining parenthetically the reasons for wanting to make the division of her trust property which she described. She declared that she felt an obligation to help her youngest child, and stated her belief that he needed the largest part of her trust estate. When the will was typed, it was read to decedent and witnessed by decedent's nurse and the head nurse. After the will was drafted, but before it was executed however, decedent decided she also wished to make a conditional disposition of sale proceeds from one of the allotments which was pending sale, and at her direction a codicil providing for the contingency was made and executed at the same time the will was signed. The clerk and both nurses witnessing the will agree that decedent was alert and knew what she was doing when she signed the will. Although decedent's hands were badly swollen from the progression of her disease so that she had difficulty holding the pen when she signed, the head nurse noted that June 17 was "one of Leona's better days."

The circumstances described indicate the decedent had asked for someone to help her draw a will. Whether she had personally conveyed the request to the agency is, under the circumstances, extremely unlikely, since she was confined to her hospital bed. The record shows

[1] 397 U.S. 598 (1970). Numerous Departmental decisions have considered these same issues since 1970; for a discussion of those opinions *see Estate of Joseph Caddo*, 7 IBIA 286 (1979).

[2] But *see* the concurring opinion in *Tooahnippah* v. *Hickel*, 397 U.S. 619, where Mr. Justice Harlan opined that wills disinheriting certain persons should be carefully considered "[i]f such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertance * * *." The testamentary circumstances in this case are also examined against this stated standard.

[3] In *Akers* v. *Morton*, 499 F.2d 44 (9th Cir. 1974) *cert. denied* 423 U.S. 831 (1975), the court, following *Tooahnippah*, affirmed the Secretary's approval of a will disinheriting a wife even though the circumstances favoring the wife's claims were most compelling.

that she had her plan of disposition ready, discussed her property and her family situation in detail, dictated the terms of the will herself and showed generally that she was ready to make her will and wanted to do so. Nothing in the circumstances surrounding her contacts with the agency clerk suggests there was any improper influence used to procure the preparation of decedent's will.

[2] (2) *The subscribing witnesses.* The record shows that the two nurses from Minot were reluctant to come to New Town for the probate hearings. They did, however, attend the November 1978 session, which was concerned exclusively with their testimony. Although the parties were represented by counsel, significantly neither lawyer inquired about the reasons for the witnesses' reluctance to appear at the earlier hearing. The consistent, uncontradicted, and unimpeached testimony of both nurses is in accord that decedent was competent when she signed the will. Both witnesses give reasons for thinking that decedent knew what she did when she signed. They describe in detail her conduct as a patient and her behavior when her family visited her. The testimony of the head nurse also shows she had known decedent previously and based her opinion that decedent was able to comprehend her acts not only upon their most recent contacts, but also upon prior acquaintance. In contrast, the testimony of the attending physician was vague concerning the ability of decedent to function during her last illness. He testified in detail concerning the symptoms of diabetes and the effect the disease had upon decedent's body. He was unwilling to express an opinion about the effect the sickness may have had upon her mind, and he said so. His testimony tends to support the nurses' testimony with details concerning decedent's specific ailments. Nothing in the circumstances of the testimony of the subscribing witnesses reflects doubt upon the capacity of decedent as a testatrix.

3. *The reasoning of the testamentary plan.* Although the will does not contain a written explanation after each devise or bequest, the testimony of the agency clerk supplied exactly that. There is much more explanation given here than is usually the case. (Indeed, in the ordinary case, no such explanation is necessary.) However, perhaps since decedent and the clerk were acquainted, the drafting process included both discussion and explanation of the course of events in decedent's family (all of whom were known to both women), and a reason for each devise or bequest in relation to the personal situation of each child was supplied. Were there some showing in this case of an attempt to influence decedent, her statement of reasons for the dispositions made by her will would rebut it. Also, had there been a deterioration in decedent's mental condition, the detailed discussion and analysis described by the clerk should have revealed that as well. The complete openness of the testatrix with the

agency clerk throughout the entire transaction dispels any doubts that might be raised by the will's plan of distribution. Under the circumstances described, the plan appears to be neither neglectful nor unnatural.

(4) *The logic of the testamentary plan.* Despite the fact one son received more property from the will than both appellants combined and the record indicates all children were well regarded by their mother, it does not necessarily follow that the unequal distribution can only be explained by lack of testimentary capacity. Such a conclusion, in the absence of facts to support it, merely indicates a tendency to equate affection to a system of monetary reward. Preference may be given by a will for one child over another for reasons other than the personal preference of the testatrix. In this case the decedent stated such reasons when she dictated her will; she stated that a sense of obligation to her youngest child, together with a sense the others did not need assistance, dictated the disposition chosen. It is conceivable, but immaterial, that her personal inclinations had she followed them instead of a sense of maternal duty, might have dictated other choices. Indeed, as the plan is explained by the testimony of the agency clerk, when the difference in the ages and situation of decedent's children is considered, the testamentary scheme is consistent with natural family affections. Since there is no showing anywhere in the record that decedent experienced mental failure as a result of her sickness, no such failure can be presumed from the testamentary plan on the basis that the plan was inconsistent with decedent's desires.

(5) *The signature.* Comparison of the two handwriting samples offered does show a marked change. The difference is entirely consistent with the testimony of the attending physician and the two subscribing witnesses, and is fully explained by the swollen condition of decedent's hands. The condition of decedent's hands is completely uninstructive on the issue of testamentary capacity sought to be raised on appeal, since considering the record as a whole, there is no showing of mental deterioration corresponding to the progression of the disease which ended decedent's life.

The Administrative Law Judge correctly found decedent to be competent to make a will. The will was properly admitted to probate pursuant to Departmental regulation.[4]

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order determining heirs issued Apr. 9, 1979, is affirmed.

This decision is final for the Department.

FRANKLIN ARNESS
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

[4] 43 CFR 4.233, implementing the Act of June 25, 1910, 36 Stat. 856, *as amended* (25 U.S.C. § 373 (1976)).

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